IN THE

Supreme Court of the United States

October Term, 1926.

No. 198.

JOSEPH SEEMAN, SIGEL W. SEEMAN, SYLVAN L. STIX, CARL SEEMAN and FREDERICK SEEMAN, co-partners, doing business under the firm name and style of SEEMAN BROTHERS,

Petitioners,

against

PHILADELPHIA WAREHOUSE CO.,

Respondent.

BRIEF OF RESPONDENT.

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Brief of Respondent.

CASES CITED.

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BRIEF OF RESPONDENT.

Statement.

The respondent brought this action to recover damages for the conversion of 999 cases of canned salmon, title of which was in the respondent under a negotiable bill of lading endorsed to it by the firm of A. J. Coccaro & Co., who later in disregard of such transfer of title to the respondent, sold the goods to the petitioners (R., 2-4). Respondent's title to the goods and their taking by the petitioners having been clearly established at the trial, the petitioners were forced to rely entirely upon the defense of usury claimed to have been exacted by the respondents from A. J. Coccaro & Co. (R., 274, 278). The judgment entered upon the verdict in favor of the petitioners was reversed by the United States Circuit Court of Appeals, Second Circuit. See opinion by Manton, J. (R., 391-8) reported in 7 Fed. (2nd), 999.

The respondent is a Corporation of the State of Pennsylvania, having its only office in Philadelphia, Pa., where it has been carrying on its business since 1871 (R., 69). It was incorporated under a special act of the legislature of Pennsylvania, under which it has been carrying on its business of advancing to merchants its high credit, built on its resources and standing. Its contracts and methods, as pointed out by the court below, had been sanctioned by the highest court of Pennsylvania as far back as 1882 (R., 394, Righter, Cowgill & Co. v. Philadelphia Warehouse Co., 99 Pa. St., 289).

The respondent's regular course of business for many years past has been as follows:

It advances its credit by issuing its own promissory note to a merchant, who pledges with the respondent merchandise to insure that at the maturity of the note the merchant will make provision for its payment. Thus there is placed at the disposal of the pledgor a note which can readily be turned into cash by a sale by the pledgor or by note brokers. In this manner the respondent advances its credit upon merchandise deposited with it as collateral up to a specified percentage of the market value of such merchandise, as determined by the respondent's inspection and by independent appraisal (R., 69, 70-71). The respondent's uniform charge and the actual amount it invariably receives for the issuance of its promissory note against pledge of merchandise in public warehouses, is at the rate of 3% per annum upon the face amount of its note so issued (R., 71). Beyond this charge the respondent neither receives nor exacts additional remuneration, commission or benefit, directly or indirectly (R., 71, 76, 87, 99).

The respondent will deliver its note or notes to the person applying for the advance of credit, to be disposed of as the applicant chooses, or the respondent will, for

the applicant's accommodation and on his written instruction, turn over the note or notes to a note broker for sale by him as agent for the applicant—there are note brokers in Philadelphia who are in touch with many banks and bankers from Maine to California who are accustomed to buying the respondent's notes during the last half century (R., 71). If the applicant chooses to have the note or notes sold through such brokers, the respondent will deliver to the applicant the identical check received from the brokers (R., 71, 85, 142, 147). The respondent prefers to have its notes handled through the Philadelphia brokers, but it does not insist that the notes be sold by the applicant only through those brokers (R., 71). See for example, the two transactions between the respondent and Coccaro & Co. where its notes were sold to a bank, not one of its own banks of deposit, without the intervention of note brokers and where the respondent returned to Coccaro & Co. the customary broker's commission paid in advance by Coccaro & Co. (P. Exs. 35, 37, 41-D-C, 41-F-C; R., 300, 301, 322, 327).

When an advance of credit is made by the respondent, the applicant uniformly signs a printed pledge agreement (P. Ex. 21, R., 284-7). At the same time, the applicant pays to the respondent its commission in advance at the rate of 3% per annum upon the face value of the notes which the respondent is to issue, and also the sum necessary to pay for the internal revenue stamps on the notes. These notes are always issued by the respondent at its office in Philadelphia, where the applicant, by the terms of the printed agreement, is required to make all of his payments (R., 102, 285).

If the applicant desires the respondent's promissory notes to be delivered to him direct, that is done (R., 71). If he wants them sold by the note brokers recommended by the respondent, he signs and delivers to the respondent an order to that effect (P. Ex. 22, R., 287).

It is to be observed that respondent's obligation to the applicant terminates upon the issuance and delivery of its notes—in Philadelphia. In each instance where the respondent, acting for the applicant turns over these notes for sale to a note broker, the money resulting from the sale is remitted by the broker in Philadelphia to the respondent, in Philadelphia, as the applicant's representative who sends to the applicant the identical check so received (P. Ex. 42; R., 142, 327).

When the date of maturity of the note, originally issued by the respondent, arrives, the applicant is under the terms of his contract, obliged to pay to the respondent a sum equivalent to the face value of the note itself (R., 285). If, however, on the due date the applicant is unable or unwilling to make this payment, his inability or unwillingness does not relieve the respondent from the necessity of paying its own promissory note previously sold in the open market. If the applicant performs his contract he pays a sum equivalent to the face amount of the note to the respondent; the respondent is then in funds to meet its own maturing obligation, and the transaction is closed. If, however, the applicant does not do this, the respondent, under the contract, can have recourse to the security. To avoid this latter contingency, a machinery is provided by which, for the convenience of the applicant, the respondent on the written application of the applicant (P. Ex. 30; R., 295), will issue a new note in like sum, which, in turn, will be sold in the open market to supply itself partially with funds to meet its maturing obligation. We say to put itself in funds partially, because, just as in the first instance the original note was sold in the open market at a discount from its face value, so must the second note be sold at whatever rate is then current on the discount market, which may or may not vary from the original discount. When this renewal note is sold, the net proceeds thereof, that is to say, the proceeds less the discount and broker's fees, are paid over to the re-

spondent, and when applied in full to the redemption of its maturing obligation, will leave a balance still to be met. This small balance is supplied by the applicant who, at the time that he requests the further renewal, or, as the parties have termed it, an extension of the advance of credit, pays by his check to the respondent a sum equivalent to the discount, brokerage fees and the Internal Revenue stamps (R., 87).

With these moneys paid to it by the applicant, together with the net proceeds of the sale of the new note, the respondent is placed in possession of funds with which to meet its original obligation then maturing. The original transaction is thus closed, and a new transaction is thus substituted for it. In order to induce the respondent to make this further or new advance of credit, the applicant pays a charge at the rate of 3% per annum on the respondent's new notes on the new transaction. By this operation the respondent performs the same service in this so-called extension as it performed in the original transaction (R., 86-159).

The respondent, each year, issues its notes in these transactions in an amount between \$2,000,000 and \$5,000,000 (R., 251), a substantial part of which was sold by S. B. Lewis & Co., note brokers (R., 163). S. B. Lewis & Co. is a Pennsylvania corporation, specializing in the sale of commercial paper and has its office in Philadelphia. It has been in this business for many years (R., 149). It is a corporation separate and distinct from the respondent and has no relations with the respondent and none of its officers or members are officers or members of the respondent (R., 150). Neither one of the two concerns are interested directly or indirectly in the affairs of the other, or in the profits of the other or otherwise. S. B. Lewis & Co. keeps the respondent informed of the current market rate at which the respondent's paper can be sold so that its officers and employees can inform applicants (R., 171).

The procedure applied to the instant case.

The procedure with Coccaro & Co. followed in every particular respondent's regular methods and the printed forms used were those regularly used by the respondent (R., 137)—they were not prepared just for the respondent's dealings with Coccaro & Co. The title to the goods, for the conversion of which this action was brought, was in the respondent under a negotiable railroad bill of lading endorsed to the respondent by A. J. Coccaro & Co. on November 18, 1919 (P. Ex. 23, R., 288-291). The goods were pledged on that day by Coccaro & Co. to the respondent as security for an advance of credit in the sum of $5,900.00 to be made by the respondent, and under the terms of the pledge agreement to be held as security for other extensions of credit, prior and subsequent (P. Ex. 21, R. 284-287).

The respondent advanced its credit by issuing its promissory note dated November 19, 1919, payable January 20, 1920, which at Coccaro & Co.'s request were delivered to S. B. Lewis & Co. note brokers (P. Ex. 22, R., 287). The net proceeds of the sale thereof, to wit, $5,834.20, represented by a cashier's check drawn to the order of the respondent, and immediately endorsed and delivered by the respondent to the First National Bank of Philadelphia, were by that bank at once remitted to Coccaro & Co. in New York City, at their request by telegraph transfer to their account in the Irving National Bank (P. Ex. 22, 24, 25, 26, 27, 28; R., 287, 291-294). This note was purchased and held by the National Rockland Bank of Boston, Mass., and the rate of discount deducted by that bank was 5¾% per annum (P. Ex. 24, 46-C; R., 155, 291, 349).

On January 20, 1920, the respondent received from Coccaro & Co. a request for an extension of this advance of credit and granted such request, issuing two promissory notes for $2,500 and $2,400 respectively, dated January

20, 1920, and payable March 23, 1920, which were sold by S. B. Lewis & Co. at an expense of $69.33. This sum plus $1.18, cost of internal revenue stamps, and $30.98, the respondent's commission at 3% per annum, a total of $101.49, Coccaro & Co. remitted to the respondent with the request for the extension (P. Ex. 31, 32, R., 295-298). At the maturity of these new notes, Coccaro & Co. requested a further extension, which was granted on the payment of $700 on account, which amount was received the next day. With the request Coccaro & Co. paid the plaintiff the expense of discounting the new note through S. B. Lewis & Co. ($62.69), the cost of internal revenue stamps $1.04 and the respondent's commission at the rate of 3% per annum $26.87 (P. Ex. 36; R., 300). Respondent thereupon issued its new note for $5,200.00 dated March 23, 1920, payable May 24, 1920. The note was not sold through S. B. Lewis & Co., however, but was discounted by the Centennial National Bank of Philadelphia at the respondent's request, and the charge that S. B. Lewis & Co. would have made was returned by the respondent to Coccaro & Co. (P. Exs. 34, 37; R., 299, 301).

In connection with the advance of credit by the respondent's note of $5,900, hereinbefore described, A. J. Coccaro & Co., on November 18, 1919, signed the usual pledge agreement pledging to the respondent 1,000 cases of Blue Boy Canned Salmon to secure the respondent for such advance, and other advances of credit already made or which might thereafter be made by the respondent. In token thereof Coccaro & Co. endorsed and delivered to the respondent the negotiable bill of lading for 1,000 cases of Blue Boy Canned Salmon (P. Ex. 21, 23; R., 284-7, 288-91).

The respondent at the request of Coccaro & Co. instructed the Yorke Warehouse & Storage Co., Inc., of New York City, to secure the cases of salmon from the railroad, and store the same in one of its warehouses for the respondent. Thereafter, the respondent received from the

warehouse company a non-negotiable warehouse receipt for the salmon (R., 84; P. Exs. 43-45, R., 328-9; P. Ex. 47, R., 357; P. Ex. 2, R., 280; P Ex. 19, R., 284, 284a, 284b).

Thereafter, and between February 25, 1920, and March 26, 1920, the petitioners and their assignees removed the said cases of salmon from the warehouses under an order issued to them by Coccaro & Co. on February 18, 1920 (P. Exs. 1, 3-19, 48, R., 279, 279a, 280-4, 284a, 284b, 357; R., 33-6, 145-6, 176-85).

This fraudulent appropriation of respondent's collateral was made possible through the fact (unknown to the respondent, R., 128) that the Yorke Warehouse Co. was owned by Coccaro through stock ownership. Its employees were dummies for Coccaro, and, of course, followed his instructions (R., 24, 40-54). The petitioners were not a party to this fraud.

About the maturity of the last extension of credit, and on May 27, 1920, Coccaro & Co. went into bankruptcy (R., 95).

At the time of the bankruptcy of Coccaro & Co. the firm was indebted to the respondent on six advances of credit, one of these being the credit for $5,900 furnishing the basis of the controversy in this action (R., 100, 304-6).

After the bankruptcy, respondent proceeded to examine its collateral at the Yorke Warehouse, and discovered that this collateral, together with much other collateral, had been removed (R., 96, 100). Investigation established that the petitioners and their assignees had removed the salmon in question.

The relations of A. U. Suprenant & Co., brokers of New York City, to the transactions in question are of importance to a proper understanding of the situation.

The respondent receives many applications through brokers seeking accommodation for their customers (R., 138). A. U. Suprenant & Co., brokers, brought to the respondent among various applicants, Coccaro & Co. in January, 1918 (R., 70). Surprenant introduced Anthony

J. Coccaro to William P. Cosgrove, the respondent's secretary, in the office of Suprenant & Co. in New York City. At that interview, Cosgrove explained to Coccaro in detail the nature and methods of the respondent's business, and that the respondent would only advance its credit through the issuance of its promissory notes which Coccaro & Co. might sell direct or which might be sold for Coccaro & Co. by note brokers. That conversation resulted in the respondent's making its first advance of credit to Coccaro & Co. (R., 70-2). The advance of credit involved in the case at bar, was a subsequent advance; not the first. This becomes important in view of the testimony of one McAndrew, an employee of Coccaro, which seeks to give the impression that when the advance in question here was made, the terms and basis of the arrangement were novel and unknown to Coccaro.

Coccaro and Co. had to secure financial accommodation from various persons other than the respondent through Suprenant (R., 207-12, 218-21, 358-9).

The relations between Coccaro & Co. and A. U. Suprenant & Co. were very intimate. In October, 1919, they entered into a written agreement under which the latter, for a consideration, were to obtain financial accommodation for Coccaro to finance the purchase of merchandise (D. Ex. F, R., 209-10, 360-364).

The respondent knew nothing about the arrangements between Coccaro & Co. and A. U. Suprenant & Co. (R., 246, 231).

The case was submitted to the jury entirely on the defense of usury, the respondent's motion to strike out that defense and for a directed verdict being overruled (R., 259-63). The verdict of the jury was in favor of the petitioners and the judgment entered thereon has been reversed by the United States Circuit Court of Appeals, Second Circuit, which decided that the evidence did not sustain such verdict, that upon the evidence submitted at

the trial the trial court should have directed a verdict for the respondent because there was no evidence to sustain a finding that the respondent exacted usury from Coccaro & Co. The Circuit Court of Appeals also decided that the submission of the case to the jury on the theory that it was governed by the laws of New York State was erroneous because the evidence showed that it was subject only to the law of Pennsylvania, under which a contract for the payment of more than 6 per cent, interest is not illegal. The opinion is reported in 7 Fed. (2d), 999.

Summary of Argument.

The respondent sold the use of its credit to Coccaro & Co., and the arrangement between the respondent and Coccaro & Co. was not within the prohibition of the usury laws of either New York or Pennsylvania.

Before A. J. Coccaro, on behalf of that firm, signed the pledge agreement covering the canned salmon converted by the petitioners, he was fully informed of the nature of respondent's business; that it did not lend money, but only advanced its credit in the form of its promissory notes; that such notes would be delivered to applicants, or upon their direction delivered to note brokers for sale; that all applicants in addition to paying the respondent its charge of one-fourth of 1% per month for the use of its credit, were required to pay the charges connected with the sale of such notes, including brokerage and discount, and he expressly authorized the respondent to deliver its notes issued under the pledge agreement signed by Coccaro to the note brokers in Philadelphia for sale.

A person to whom an application for a loan has been made may refuse to lend money to the applicant, but offer an advance or sale of credit. If the applicant accepts, the arrangement is a sale of credit and not a loan of money.

There is no distinction between an advance or sale of

credit by endorsing an applicant's promissory note, and an advance or sale of credit by issuing one's own promissory note, which can be sold by or in behalf of the applicant. In either case the purchaser of the note buys it because of his reliance upon the promise to pay of the person extending the credit, whether by endorsement or by its independent note.

The respondent received only one-fourth of 1% per month for the use of its credit by Coccaro & Co.

Even if the transaction be construed as a loan of money, the respondent received from Coccaro & Co. only one-fourth of 1% per month for the accommodation extended by it to Coccaro & Co.—the brokerage charge and the discount, like the money expended for internal revenue stamps, were disbursements that were properly payable by Coccaro & Co.

The pledge agreement was made in the State of Pennsylvania, was to be performed there, and is therefore to be construed according to the laws of Pennsylvania under which only the interest over 6% per annum may be lost to a lender.

The Circuit Court of Appeals properly reversed the judgment of the trial court, because all the evidence, taken together, shows that the transaction between the respondent and Coccaro & Co. was a sale of credit and not a loan of money, and that accordingly the trial court erred in refusing the respondent's motion to strike out the defense of usury and to direct a verdict in favor of the respondent. Such error was an error of law that was properly reviewed and corrected by the Circuit Court of Appeals.

Argument.

POINT I.

The respondent sold the use of its credit to Coccaro & Co. and the arrangement between the respondent and Coccaro & Co. was not within the prohibition of the usury laws of either New York or Pennsylvania.

The 999 cases of canned salmon converted by the petitioners were pledged with the respondent by Coccaro & Co. under a pledge agreement, the material parts of which are as follows (P. Ex. 21, R., 284-7):

"Philadelphia, November 18, 1919.

Invoice of Canned Salmon
Consigned to the
PHILADELPHIA WAREHOUSE COMPANY
By A. J. Coccaro & Co.

1000 cases #1 Tall Pink 'Blue Boy' Salmon
4000 doz. @ 2.10 8400

Having deposited with, and confided to the management, custody, and charge of, the PHILADELPHIA WAREHOUSE COMPANY the property belonging to us described in the foregoing invoice, and that Company having advanced its credit to us upon security of said property and upon our warranties herein recited, by delivery to us of its promissory note for Five thousand nine hundred Dollars dated November 18, 1919, payable January 20, 1920, receiving Thirty and 48/100 Dollars as commission for its responsibility and services, as above, and advance of its credit; now, in consideration of said advance, we do hereby promise and agree to and with the said Company that we will pay to it, at its office in the City of Philadelphia, at or

before the maturity of its said promissory note, Five thousand nine hundred Dollars, together with all charges for storage, insurance, and other necessary expenses, including counsel fees, on account of the said property so confided to its management, custody and charge.

And we, the undersigned, do also agree with the said Company to the following terms and conditions as part of this contract: * * *"

"3. The property pledged hereunder, together with any heretofore or hereafter pledged by the undersigned to the said Company to secure this or any other liability, general or special shall constitute a general continuing collateral security for all obligations or liabilities of the undersigned to the said Company now existing or hereafter created, contingent, absolute, liquidated or unliquidated, and the said Company's right, title and interest therein shall be prior to all liens or claims thereon, or on the proceeds thereof. And if any property be consigned or delivered to the said Company by the undersigned, either in substitution for property withdrawn or as additional security, such substituted or added collateral shall be subject to all the terms and conditions of this contract, including the maintenance of whatever margin may be stipulated for in case of such property."

The other five pledge agreements mentioned in the testimony and the briefs are similar except as to dates, merchandise pledged, amount of advances of credit and amounts of respondent's commissions (P. Ex. 41-A, R., 307-15).

The pledge agreement distinctly provides that the $30.48 was paid to the respondent by Coccaro & Co. "as commission for its responsibility and services, as above, and advance of its credit" (R., 285).

Before Anthony J. Coccaro of the firm of Coccaro & Co. signed the pledge agreements, Cosgrove, the respondent's secretary, explained to him that the respondent does not loan money but only advances its credit through the instrumentality of promissory notes which the applicant might sell through any one of his own banks, or, if he desired, through a note broker, and that the respondent preferred if the sale was made through a note broker that it be through a Philadelphia note broker acquainted with the market for the respondent's promissory notes (R., 70-1, 130).

In its prima facie case the respondent offered in evidence all the documents in its possession and in the possession of S. B. Lewis & Co., note brokers, including the pledge contract (P. Ex. 21; R., 284-7); Coccaro & Co.'s request to have the note delivered to S. B. Lewis & Co.; (P. Ex. 22; R., 287), the note, endorsed by National Rockland Bank of Boston, Mass. (P. Ex. 24; R., 291); S. B. Lewis & Co.'s report of its sale, a copy of which was sent to Coccaro & Co. (P. Ex. 25, 28; R., 292, 293-4); S. B. Lewis & Co.'s order on First National Bank of Philadelphia for a check for the net proceeds of the note (P. Ex. 46-B-D; R., 344, fol. 420); S. B. Lewis's bill to National Rockland Bank, the purchaser of the note (P. Ex. 46-C.-C.&D.; R., 349); S. B. Lewis & Co.'s memo of sale (P. Ex. 46-A-D; R., 331); check of First National Bank for net proceeds of note and letter of the respondent returning it to First National Bank for transfer of net proceeds to Coccaro & Co. (P. Ex. 26, 27; R., 293); and also similar documents on the extensions, and on the other transactions with Coccaro & Co.

Recognizing the fact that those documents established the respondent's prima facie case and did not disclose any usury, the petitioners offered the testimony of one McAndrews, a former employee of Coccaro & Co. as their only witness in support of the defense of usury.

His whole testimony must be considered and not simply disjointed portions, and when this is done it will be found that the record does not sustain the contentions of the petitioners.

The fact that McAndrews was called by the petitioners does not of itself establish that his testimony is sufficient to sustain a verdict in favor of the petitioners.

Ziang Sung Wan v. *U. S.*, 266 U. S., 1.

The petitioners claim that McAndrews was Coccaro's confidential man and that he negotiated the series of advances of credit mentioned in the respondent's bill of particulars. Yet he testified (R., 208): "I cannot tell you personally that I ever negotiated a loan. I never negotiated a loan."

He testified that, though he went to Surprenant's office on numerous occasions, he was never introduced to Surprenant by Coccaro and that he met Surprenant only by doing errands for Coccaro (R., 205). According to his own testimony, Surprenant spoke to him as if he were an errand boy and not Coccaro's confidential man in charge of the financing of Coccaro's business (R., 201). He was never introduced to Cosgrove, respondent's secretary and representative (R., 122-3). He went to Philadelphia to get the check for the proceeds of November 8, 1919 notes, but that was after the negotiations between Coccaro and Cosgrove had been completed. He neither signed nor dictated any letter to the respondent with reference to the status of the advances of credit (R., 246-7, 298, 299, 328). He testified that he never thought Surprenant was Coccaro's broker, yet he testified (R., 207): "Mr. Surprenant himself was supposed to negotiate the loans for us, and how he brought it about—I personally do not know." His testimony in respect to the alleged conversation with Cosgrove (unequivocally denied by Cosgrove, R., 246-51) is highly improbable.

In *Houghton* v. *Burden*, 228 U. S., 161, where this Court considered similar testimony of witnesses eager to make void a transaction so improbable that it reversed a judgment on a verdict based on it, this Court said (pp. 171-2):

> "Why should Burden make an agreement to enable him to receive usurious interest, and at the same time make it impossible for him to take such interest without placing him absolutely at the mercy of Canfield?
>
> There is no pretense that Burden was non compos mentis at the time, and yet it is difficult to believe that any rational being would have gone to the trouble and expense of having this elaborate agreement prepared for the purpose of avoiding the usury law, and at the same time admit to the only man who could interpose the defense of usury that it was a void agreement. So far as the validity of the agreement is concerned, Burden might as well have stamped in red ink on its face the words, 'void for usury.'
>
> We must assume that Burden is a man of ordinary common sense, but in order to find that he made the statement quoted, we must convict him of stupidity which is unique in its originality. It is difficult to imagine that a rational being would procure a safe to protect him from burglary, and immediately send the 'combination' to the burglar whom he had most reason to dread (113 C. C. A., 565, 193 Fed., 937).
>
> Canfield is supported by his bookkeepr, though her account of the matter is materially different from his. Burden is supported by Koehler, the broker, who was in the negotiations throughout, and so far as appears, absolutely disinterested. There are two witnesses against two, and the burden to make out the usury is strongly upon the appellant. *Stillman* v. *Northrup*, 109 N. Y., 473, 478, 17 N. E., 379; *White* v. *Benjamin*, 138 N. Y., 623, 624, 33, N. E., 1037. In the case last cited it was said:

'Usury is a crime; and he who alleges it as a defense to an obligation must establish it by clear and satisfactory evidence.' "

Further, the transaction with which McAndrew claims so important a part was not the first transaction between Coccaro & Co. and the respondent (R., 70, 250).

There is no difference in principle between paying for the endorsement or guaranty of a promissory note on which the maker is primarily liable (which the petitioners concede is legal), and paying for the use of the endorser's or guarantor's credit, through giving of a promissory note, upon a promise of the borrower of the credit contained in a separate document to meet the note in full. In the one case the person seeking the signature says: "If you will endorse or guarantee my promissory note payable two months from date, so that I may raise funds by selling it, I will pay you ½ of 1% of its face amount." That endorsement or guarantee the petitioners admit is a sale of credit for which the person selling the credit may charge any amount agreed upon. In the other case, the person seeking the promissory note says: "If you will give me your promissory note payable two months from date, so that I may raise funds by selling it, I will place in your hands at or before the maturity of your promissory note the sum which you in your promissory note agree to pay and will also pay you ½ of 1% of such sum for issuing such promissory note." This latter transaction, the petitioners, for the purpose of this case, assert is a loan of money, a contention not sustained by reason or authority.

The Circuit Court of Appeals correctly found that these transactions constituted sales of credit, were exactly as represented by the respondent, and that there was no evidence adduced by the petitioners to impeach the respondent's proof. Corrupt intent is an essential element of usury. But here there is no evidence of any corrupt in-

tent on the part of the respondent to exact usurious interest. There was no evidence that the actual agreement was other than as shown by the respondent's oral and documentary evidence, a sale of credit. Every note delivered to S. B. Lewis & Co. was actually sold by S. B. Lewis & Co. to a banking institution and actually delivered to the purchaser (P. Ex. 46-C, 41-D, 24, 31; R., 349-56, 318-24, 291, 295-296). *The evidence is uncontradicted that the respondent in no manner participated in or received any part of any sums paid to Lewis or Surprenant. In no case did the respondent receive more than 3% per annum in payment for its advances of credit.*

The Circuit Court of Appeals very correctly says (R., 394-5):

> "The courts have long recognized the difference between a lending or sale of credit and the lending of money, and have repeatedly held that for a lending or sale of credit any price demanded may be paid by the borrower without subjecting the contract to the taint of usury. (Ryttenburg v. Schefer, 131 Fed., 313; Title Guarantee & Surety Co. v. Klein, 178 Fed., 689; Meeker v. Fiero, 145 N. Y., 165.) In order to taint a loan with usury a corrupt purpose or intent on the part of the person who takes the security to secure an illegal rate of interest for the money or forbearance of money must exist as a fact or in law. There must be a lender and a borrower and it must appear that the real purpose of the negotiations and transaction was, on the one side, to loan money at usurious interest reserved in some form by the contract, and on the other side, to borrow upon the usurious terms dictated by the lender. (Orvis v. Curtiss, 157 N. Y., 657.) Any person is at liberty to sell his credit at whatever price he can get for it, precisely as he is at liberty to sell any other commodity which he may have. If the transaction is in good faith and not a

mere cloak or device for covering a usurious contract, a greater discount may be charged than the prescribed rate of interest without contravening the usury laws. And where usury is interposed as a defense, it must be proved by the party asserting it."

In addition to the cases cited by the Circuit Court of Appeals as authorities for the proposition that any price may be asked for the sale of credit without subjecting the contract to the taint of usury, the following may be considered:

Forgotston v. *McKeon,* 14 N. Y. App. Div., 342;
Ketchum v. *Barber,* 4 Hill. (N. Y.), 224;
Palmer v. *Jones,* 69 Hun (N. Y.), 240;
Elwell v. *Chamberlain,* 31 N. Y., 611;
Orvis v. *Curtiss,* 157 N. Y., 657.

POINT II.

Even if construed as loans of money, and not as sales of credit, no usury was exacted or paid.

As shown in Point I, the respondent did not receive from S. B. Lewis & Co. or the various purchasers of the notes any part of the brokerage or discount deducted on the sales of the various notes.

The amounts paid out by the respondent for Internal Revenue stamps on the various notes; the deductions of S. B. Lewis & Co.'s brokerage charge for selling the notes; and the discounts deducted by the various purchasers of the notes were disbursements that the respondent was entitled to have refunded to it by Coccaro & Co. and may not be considered additional interest exacted.

Brown v. *Robinson,* 224 N. Y., 301, 314;
Seamen's Bank v. *Fell,* 166 N. Y. App. Div., 271;
Houghton v. *Burden,* 228 U. S., 161;

Matter of Mesibovsky, 200 Fed., 562;
Eaton v. *Alger,* 2 Keyes, N. Y. Ct. of App., 41;
Thurston v. *Cornell,* 38 N. Y., 281;
Washburn v. *Rider,* 2 New York City Ct. Rep., 127.

The petitioners contend that the payments made by Coccaro to Surprenant constituted part of the usurious interest exacted by the respondent.

Here the petitioners are again forced to rely on the witness McAndrew for their proof.

McAndrew testified that he never thought Surprenant was Coccaro's broker; but in unguarded talkative mood he testified (R., 207):

> "I do know that we borrowed direct from Mr. Surprenant. Mr. Surprenant himself was supposed to negotiate the loan for us, and how he brought it about I personally—I personally do not know. I know that there was numerous firms that will tender us various documents, that Coccaro would sign and I personally would take them to the offices of A. U. Surprenant, accompanied with cash or checks."

Under cross-examination he testified that Coccaro & Co. had a contract with Surprenant's concern for the raising of money, and a study of that contract (D. Ex. F; R., 208-10, R., 361-364) showed the very large interest of Surprenant's concern in Coccaro & Co., and that Surprenant's concern was the general broker of Coccaro & Co. for the obtaining of loans. Surprenant was the broker who brought Coccaro to the respondent and through him each transaction with Coccaro & Co. was initiated (R., 70, 72). As Surprenant was Coccaro's agent and broker, the amount paid him as commission by Coccaro may not be considered as part of the compensation received by the respondent.

POINT III.

Assuming, for the purpose of the argument, that the transactions in question constituted "loans" of money and not sales or advances of credit, the law of Pennsylvania, governed.

Clark v. *Belt,* 223 Fed. Rep., 573;
Opdyke v. *Merwin,* 13 Hun N. Y., 401;
Tilden v. *Blair,* 88 U. S., 241;
Winch v. *Farmers' Loan & Trust Co.,* 11 N. Y. Misc., 390;
Huber v. *D'Esterre,* 180 N. Y. App. Div., 220;
Northwestern Terra Cotta Co. v. *Caldwell,* 234 Fed. Rep., 491;
Brower v. *Life Insurance Co. of Va.,* 86 Fed. Rep., 748;
Ringer v. *Virgin Timber Co.,* 213 Fed. Rep., 1001;
Coghlan v. *South Carolina R. Co.,* 142 U. S., 101;
Central Bank of Washington v. *Hume,* 128 U. S., 195;
New England Oil Corp. v. *Island Oil Marketing Corp.,* 288 Fed., 967;
Cutler v. *Wright,* 22 N. Y., 472;
Dickenson v. *Edwards,* 77 N. Y., 573;
Jewell v. *Wright,* 30 N. Y., 259.

The pledge agreement was dated in Philadelphia and drawn there. The extensions were procured by written applications delivered in Philadelphia. The contract was a unilateral one; in fact it did not become a contract under its terms until the respondent made the next move after the pledge agreement was signed, by the issuance of its note. That was done, not in New York, but in Philadelphia. The pledge agreement provided that the applicant was obligated to make his payments to the respondent in Philadelphia. In each case respondent deliv-

ered its notes in Philadelphia to note brokers designated by Coccaro. Its duty under the agreement ended when it issued its note, and, in any event, when it undertook, as agent for the applicant, to deliver its note to the note brokers for sale. It cannot be inferred (there is no evidence at all on the point) that the respondent contracted to or was under obligation to see that the proceeds reached New York.

The varied ways in which the proceeds of these notes reached Coccaro quite refute any agreement on the point. On at least one occasion the money was delivered in person to Coccaro's representative in Philadelphia, in others sent by mail to him from Philadelphia, in others by telegraph and in still other instances mailed or telegraphed to Coccaro's bank.

On the other hand, we have the very important fact, that the applicant had the option to receive the note and do with it what he chose, rather than to have it sold through notebrokers in Philadelphia.

The case of *Hooley* v. *Talcott* (129 N. Y. App. Div., 233), cited in the respondent's brief, pages 22, 29, is clearly distinguishable from the case at bar.

In that case, the lender resided in New York State, and all transactions between the lender and the borrower who resided in Philadelphia took place in New York, the borrower acting through an agent residing in New York. A loan was made by the lender to the borrower upon notes drawn in blank in Philadelphia and signed there, but completed and delivered in New York. The notes were payable in Philadelphia, the place of residence of the borrower, and not the place of residence of the lender. The lender received two checks from the borrower, one drawn for the amount of the interest upon the respective loans, and the other drawn to the order of the borrower's agent in New York, but endorsed over by that agent to the lender, although the borrower's agent was in no way indebted to the lender. It was apparent that the lender

received both checks as interest upon the respective loans, and that he received it in two amounts for the distinct purpose of avoiding the New York law with reference to usury. The logical place for the payment of the note was certainly the place of business of the lender. All transactions between him and the borrower were had in New York, both in the original loans and the renewals. In no case, was anything done in Philadelphia, except the signing of the notes dated in Philadelphia. *Talcott loaned money to Scherr—he did not sell or lend his credit to Scherr.* The sole question before the New York Appellate Division in that case was whether the New York or Pennsylvania law of usury *applied to Scherr's (the borrower's) notes.*

In the case at bar the situation was quite the reverse.

As we have pointed out earlier in this brief, the history of the transaction shows that there was no attempt to avoid usury by hiding behind the laws of the State of Pennsylvania; but, on the contrary, the transaction was in its important aspects wholly a Pennsylvania transaction, the minor details of which were carried out in New York. The methods followed in this case were not manufactured for the purposes of this transaction but in substance followed the course of procedure used by the respondent for upwards of fifty years. It was a Pennsylvania concern; it was transacting its business there; it was advancing its credit there; and it must follow that the law of Pennsylvania governs.

Under the law and decisions of the State of Pennsylvania, a contract for a loan or use of money, which calls for a rate of interest in excess of six per cent, per annum, is not unlawful and will be enforced in the State of Pennsylvania.

> *Montague* v. *McDowell*, 99 Pa., 265;
> *Stayton* v. *Riddle*, 114 Pa., 464;
> *Marr* v. *Marr*, 110 Pa., 60;

Colvin v. *Blymyer*, 121 Pa., 582;
Read's Appeal, 126 Pa., 415;
Appeal of Pettis, 126 Pa., 420;
Commonwealth v. *Hill*, 46 Pa. Sup., 505.

The courts of Pennsylvania would construe the agreement in question here as a Pennsylvania contract.

Campbell v. *Hunt*, 60 Super. Ct. Pa., 332;
Stuart v. *Barry*, 60 Super. Ct. Pa., 370;
Stoddard v. *Blackman*, 60 Super. Ct. Pa., 371;
Stoddard v. *Thomas*, 60 Super. Ct. Pa., 177.

In *Andrews* v. *Pond Co.*, 13 Peters, 65, cited in the respondent's brief at pages 11 and 37, it clearly appears that the ten per cent rate charged as exchange was charged without reference to the law of either New York or Alabama, and that the name "exchange" given to the charge was given for the purpose of concealing the fact that the charge was in fact interest, and that the lender was trying to conceal that fact for the purpose of evading the New York law.

Every fact adduced at the trial of this action by oral or written testimony pointed to the conclusion that this transaction was a Pennsylvania transaction, made by a Pennsylvania corporation in the State of Pennsylvania in the regular course of its business, where every important part of the transaction was accomplished; and that only in respect to matters of convenience to the applicant, did anything take place in the State of New York. Any other construction of the agreement and transaction would be clearly contrary to the facts and intentions of the parties.

POINT IV.

Respondent's reply to some of the petitioners' points.

The petitioners seek to make it appear that the respondent inserted an advertisement (D. Ex. H; R., 364) in a newspaper and that as a result Coccaro & Co. began negotiations terminating in the transactions in question here and that these were the first transactions between them and that the respondents' methods were for the first time discussed because of that advertisement. The facts are different. There is no evidence that Coccaro or McAndrew ever saw the advertisement or that it had any connection with any of the negotiations. McAndrew himself does not mention it. On the contrary, the evidence is clear that Coccaro first came to the respondent through Coccaro's agent, Surprenant (R., 70).

The petitioners discuss the advertisement as if it read "Time loans on merchandise." It reads "Time loans on mdse. in any responsible warehouse at ¼% per month over lowest rate *for best commercial paper* (R., 364; italics are ours)—a very different reading from that discussed by the petitioners. We submit that any intelligent business man would understand the meaning of this advertisement, namely, that a merchant having suitable merchandise in a responsible warehouse could by pledging it obtain the best commercial paper upon which he could in turn procure money at a charge of ¼ of 1% per month over the expenses.

The nature of the respondent's arrangements with its patrons and the manner of its performance of them is not, as the petitioners seem to intimate in their brief (p. 12), a new scheme of a corporation organized to maintain warehouses for the storage of merchandise.

The respondent was organized more than fifty years ago to carry on the very business that it is now carrying on (R., 69).

In 1882 a Philadelphia concern, which had obtained from the respondent its promissory note upon the payment of a sum as commission computed at the same rate of interest as the sums paid to the respondent by Coccaro & Co. (1/4 of 1% per month of the face amount of note issued) attacked the arrangement as usurious, but the highest court of the State of Pennsylvania held that neither the pledge agreement nor the manner in which it was carried out sustained the claim of usury.

> *Righter, Cowgill & Co.* v. *Philadelphia Warehouse Co.*, 99 Pa. St., 289.

That case was in essence almost identical with the case at bar. The court there said:

> "If the testimony tended to prove that the transaction between the parties was merely a cloak for usury, and not a bona fide contract for the storage and sale of goods, to secure the loan in question, it must be conceded the jury should have been permitted to consider and pass upon the question of that presented by the plaintiff's first and second points (the first point being the one quoted above) but we fail to discover, in the provisions of the contract itself, or in the facts and circumstances connected therewith, from its inception to its completion, anything from which the jury would have been justified in finding that it was, in substance and effect, a loan of money at an usurious rate of interest."
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> * * * * * * * *
>
> "There is not a scintilla of evidence that the Thirty Dollars was paid for any other purpose than that expressed in the agreement, and in the absence of proof, neither court nor jury had a right to presume it was intended for anything else. * * * The learned Judge was clearly right in saying that no question

of usury could arise out of the discount, or the payment of Thirty dollars for services, responsibility," etc.

The petitioners seek to find a difference between the Righter case and the present case and assert that the Pennsylvania court decided in favor of the Philadelphia Warehouse Co. in the Righter case only because proof was given in that case of actual services rendered with reference to the collateral. An examination of that case will show that the pledge agreement there in evidence is to all intent and purposes identical with the pledge agreement in evidence in the case at bar and that it reads "receiving $30.00 for their responsibility and services as above and loan of their credit" referring to the Philadelphia Warehouse Co. The petitioners assert that in this case no services were rendered by the respondent. The evidence, however, shows that Cosgrove, its secretary, came on from Philadelphia at Coccaro's request and met Coccaro in New York; that he inspected and appraised the merchandise and in this case received from Coccaro a negotiable bill of lading which the respondent sent from its office to the Yorke Warehouse & Storage Co. and had that warehouse obtain the salmon from the railroad, cart it to the warehouse and issue a non-negotiable warehouse receipt to the respondent and that the respondent secured from Coccaro & Co. insurance upon the salmon (P. Exs. 2, 23, 29, 43; R., 280, 288-91, 294, 328).

The quotation from *Dunham* v. *Dey,* 13 Johns., 40, in petitioners' brief, page 14, is not apropos to this case. There the court found that from the circumstances of that transaction it was a loan of money, Dey being the endorser of one of a series of short term notes given by a firm pursuant to an arrangement whereby it was to pay Dunham $9,225 for Dunham's slightly longer term notes totalling $9,000 ($9,225 amounting to $9,000 plus interest at about 12% per annum). In this case Coccaro & Co.

agreed to pay the respondent only $5,930.48 for its 62-day note for $5,900 ($5,930.48 amounting to $5,900 plus commission at 3% per annum) under the pledge agreement covering the canned salamon. Coccaro & Co.'s promises under the other pledge agreements were similar—they were to pay the respondent only the amount of the respondent's notes plus commission at 3% per annum (R., 307-15).

In the *Dunham* v. *Dey case,* Dey did not claim that the amount of the difference between the present value of the Dunham notes and their face amount should be added in as interest paid by the borrower and the court did not have any occasion to express any opinion on such a claim. That is the nature of the petitioners' claim in this case.

Further, the statement quoted was made in 1816, long before the days of modern business with its promissory notes payable at definite dates in the future, and when business and professional people were familiar with "post notes." It was then the custom for a merchant remitting to a creditor at a distance, instead of mailing the creditor a check payable the day of its drawing, to send to the creditor a note payable at a future date, allowing for the time that it would take the mails to carry the note to the creditor and back again to the bank nearest the drawer and "then some."

The case of *Dunham* v. *Gould,* 16 Johns, 367, cited in the petitioners' brief, page 15, is similar to the Dey case—it relates to a different note of the same series.

The case of *Kaufman* v. *Schwartz,* 183 N. Y., App. Div., 510, cited in petitioner's brief, page 21, as an authority to the contrary, was decided under a special provision of the New York Banking Law, which limited the total charges made for making loans of $200 or less, and has no relation at all to the question now before this court.

In *Fowler* v. *Equitable Trust Company,* 141 U. S., 384, cited in petitioner's brief at same page, the facts were clearly different, for there it appears that the agent to whom the commissions were paid was the agent for the

lender, performing his work without any pay from the lender and under an understanding that he would receive it in the form of commissions from the borrower.

In this case the respondent had no such agent; Cosgrove was and is its salaried secretary, and Coccaro never paid him a single cent in the form of commissions. The payment by Coccaro to Surprenant was made pursuant to an agreement between themselves under which Surprenant was the regular broker of Coccaro in obtaining loans for Coccaro.

Respondent's correction of some of the statements in the petitioners' points.

At page 6 of the petitioners' points is set forth a statement in support of their contention that the respondent exacted from Coccaro & Co. from 21¼ per cent. to 23¼ per cent. per annum. That statement is not borne out by the evidence.

As stated above, the respondent's commission for the sale of its credit was at the rate of three per cent. per annum.

S. B. Lewis & Co.'s brokerage charge was at the rate of three-quarters of one per cent. per annum—all of the advances of credit and extensions thereof were at the 60-day rate—none of them were at the 90-day rate (P. Exs. 22, 25, 30, 31, 36, 37, 41-B, 41-C; R., 112, 287, 292, 295-297, 300-01, 315-17).

The notes issued on the original transactions of the respondent with Coccaro & Co. were discounted at the following rates:

Notes of	Rates Per Annum	
Nov. 8, 1919,	5½%	(R., 315-325).
Nov. 12, 1919,	5½%	(R., 316, 326-A).
Nov. 18, 1919,	5¾%	(R., 287, 292, 316, 326-A).
Nov. 31, 1919,	6%	(R., 316, 326-A).
Jan. 5, 1920,	6%	(R., 316, 326-A).

It was only on the extensions of credit that notes were discounted at more than six per cent. per annum.

Because the later notes were discounted at more than six per cent. does not affect the original transactions.

Williams v. *Fitzhugh*, 37 N. Y., 444;
Re Fishel, Nessler & Co., 192 Fed., 412.

The petitioners' witness McAndrew had carefully examined Coccaro & Co's books prior to testifying at the trial (R., 195), but he did not testify that in any instance Coccaro & Co. paid Surprenant a commission on extensions of credit made by the respondent. If he had found any entry to justify the claim of the petitioners that Coccaro & Co. paid one per cent. per month throughout the entire time that the extensions of credit ran, McAndrew doubtless would have testified to such fact.

The payments made by Coccaro & Co. to S. B. Lewis & Co. for brokerage, to the various purchasers of the notes for discounts, and to Surprenant & Co. for commissions, were disbursements made by Coccaro & Co. They were not exactions by the respondent.

The respondent knew nothing about the arrangements between Coccaro & Co. and Surprenant & Co. (R., 246, 231).

Coccaro & Co. did not go into bankruptcy because of the charges and expenses in the transactions with the respondent as alleged in the petitioners' brief (pp. 6-7). Surprenant was their general broker for raising money for their benefit (R., 207 P. Ex. F, R., 360-361), and they paid him heavy charges on many transactions other than the ones with the respondent (P. Exs. 50-51; R., 358). The fact is that Coccaro & Co. borrowed to the limit on all goods from each of two firms or banks and sold the goods to a third concern.

On page 7 of the petitioners' brief, it is stated that the respondent issued its notes to its own note-broker, and the

phrasing of their statement is apt to cause the impression that the issuing of the notes took place in New York. S. B. Lewis & Co. were note-brokers with offices in Philadelphia, not in New York, and while they were recommended by the respondent to Coccaro & Co., the notes were delivered to them for sale on the orders of Coccaro & Co. and they thus were Coccaro & Co's note-brokers in the transactions here in question. The evidence clearly shows that the notes were issued by the respondent at its office in Philadelphia and were delivered to S. B. Lewis & Co. at Philadelphia, and also that S. B. Lewis & Co. and the respondent are two entirely separate corporations (R., 150, 159).

On page 9 of the petitioners' brief, it is stated that S. B. Lewis & Co. bought the respondent's notes. The evidence clearly establishes that such was not the case; that S. B. Lewis & Co. were note-brokers; and that they, as to each of the respondent's notes, acted as agents, not as principals. The notes were purchased by the banks that later endorsed them (P. Ex. 46-C; R., 349-56).

On page 28 (Item 12) it is stated in the petitioners' brief that Cosgrove made complete investigation in New York City as to the valuation of the merchandise pledged by Coccaro & Co. The evidence does not support that contention. It shows that the respondent's office was in Philadelphia, and that its officers and employees were there, and that the respondent made independent inquiry in the trade as to all merchandise pledged with it. Cosgrove did not state that he made the independent inquiry in New York City.

The petitioners in their brief argue that the monies received on the discount of the promissory notes of the respondent issued immediately after the signing of the different pledge agreements were under its control until they reached Coccaro & Co. in New York City.

The record shows that that is not so. The identical check received by the respondent remitting the proceeds of the advance of credit of November 8, 1919, was deliv-

ered to McAndrew, Coccaro's messenger, in Philadelphia (R., 191, 315, 325). The identical check received by the respondent remitting the proceeds of the advance of credit of November 12, 1919, was mailed at Philadelphia by the respondent to Coccaro (R., 316). The identical checks received by the respondent remitting the proceeds of the two advances of credit of November 18, 1919, were delivered to the First National Bank, Philadelphia, with directions that the amounts be telephoned or telegraphed at once to the Irving National Bank, New York, to the credit of Coccaro (R., 294). The identical checks received by the respondent remitting the proceeds of the advances of credit of December 31, 1919, and January 5, 1920, were mailed at Philadelphia by the respondent to Coccaro (R., 316).

The respondent, acting as agent for Coccaro & Co., had the monies sent to Coccaro & Co., as stated, at that firm's special request.

POINT V.

The Circuit Court of Appeals properly reversed the judgment of the trial court.

Section 879 of the Judiciary Code, was not violated by the Circuit Court of Appeals in its reversal of the judgment of the trial court.

If satisfied that the testimony and all inferences which the jury could justifiably draw therefrom would be insufficient to support a different verdict, the Trial Judge had the right and duty to direct a verdict, as a matter of law. Similarly, if he failed to do so, upon a proper exception, the Circuit Court of Appeals was well within its power when it decided that the trial judge should have directed a verdict on the evidence presented at the trial.

The petitioners wholly failed to carry the burden of proof sufficient to overcome the plain language of the written documents. As was said in the case of *Stark* v. *Bauer*

Cooperage Co., 3 Fed. (2d), 214, 215 (certiorari denied 267 U. S., 604):

> "On both sides the parties were men of large affairs and long experience. As the District Judge says: 'They were highly competent to deal and dealt at arms length.' Plainly, he who would transform this contract into some different one, supposed to lie hidden in all these plain terms, carries a heavy burden."

There was no evidence in this case to justify a finding that the respondent exacted usury from Coccaro & Co., accordingly the refusal of the trial court to grant the respondent's motion to strike out the affirmative defense of usury and to direct a verdict in favor of the respondent (R., 259, 263) was an error of law, and not of fact and the judgment was properly reversed by the Circuit Court of Appeals.

> *Ziang Sung Wan* v. *U. S.*, 266 U. S., 1;
> *Baltimore & Ohio Railroad Co.* v. *Groeger*, 266 U. S., 521;
> *Southern Pacific* v. *Pool*, 160 U. S., 438.

In *Baltimore & Ohio Railroad Co.* v. *Groeger* (*supra*), this court said (p. 524):

> "The credibility of witnesses, the weight and probative force of evidence are to be determined by the jury, and not by the judge. However, many decisions of this court establish that, in every case, it is the duty of the judge to direct a verdict in favor of one of the parties when the testimony and all the inferences which the jury could justifiably draw therefrom would be insufficient to support a different finding."

Having reached the conclusion that the court below should have directed a verdict for the respondent, the Cir-

cuit Court of Appeals found it unnecessary to base its reversal on errors in the admission or rejection of evidence or in the charge of the Trial Judge. The respondent urged many such errors in its assignment of errors and its brief before the Circuit Court of Appeals.

It is submitted, therefore, that this court should in no event reverse the judgment of the Circuit Court of Appeals to the extent of reinstating the judgment of the trial court without passing on these assignments of error not mentioned or apparently considered by the court below.

CONCLUSION.

The determination of the Circuit Court of Appeals is in all respects correct and should be affirmed by this court.

The respondent made a valid sale of its credit to Coccaro & Co. As security in case Coccaro & Co. failed to meet their obligations, they pledged with the respondent the goods that were afterward, without its knowledge or consent, turned over to the petitioners.

The petitioners, although innocent, received those goods from Coccaro.

It has not been seriously questioned in this case that the petitioners could not acquire a good title to goods which were to all intents and purposes wrongfully converted.

Both parties to this litigation were innocent.

The trial judge stated at the opening of his charge (R., 264):

> "Gentlemen of the jury, this is a sad case, and you have got a hard job. It is a sad case, because, under the evidence, somebody has been the victim of a scoundrel, and it is for you to say where the loss has

got to fall. So far as the evidence shows, in a broad sense you have got to choose between two equally innocent victims."

In this situation, the petitioners seek to take advantage of the alleged claim of usury alleged to have been exacted from the wrongdoer. This made it necessary to impugn the character and methods of an old time institution of high credit and standing. This could only be accomplished by going behind the written word and having recourse to inference and suspicion.

We respectfully submit that all the evidence in the case, taken as a whole, demonstrated that the transaction between the respondent and Coccaro & Co. was exactly what the respondent claimed it to be, and what the written evidence proved it to be, a sale of credit.

The Circuit Court of Appeals properly reversed the judgment of the trial court, which without warrant of law found to the contrary.

Respectfully submitted,

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of Counsel for Respondent.

APPENDIX A.

The following is the Pennsylvania statute with respect to interest rates (Public Law 622, of May 28, 1858):

1. The lawful rate of interest for the loan or use of money in all cases where no express contract shall have been for a less rate, shall be 6% per annum, and the first and second sections of the article of the act passed March 2, 1723, entitled "An Act to reduce the interest of money from 8 to 6% per annum" be and the same is hereby repealed.
2. When a rate of interest for the loan or use of money exceeding that established by law shall have been reserved or contracted for, the borrower or debtor shall not be required to pay the creditor the excess over the legal rate, and it shall be lawful for such borrower or debtor, at his option, to retain and deduct such excess from the amount of any debt; and in all cases where any borrower or debtor shall heretofore, or hereafter have voluntarily paid the whole debt or sum loaned, together with interest exceeding the lawful rate, no action to recover back any such excess shall be sustained in any court of this commonwealth unless the same shall have been commenced within six months from and after the time of such payment. Provided, always, that nothing in this act shall affect the holders of negotiable paper taken bona fide in the usual course of business.